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No. 95-897

Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES
October Term, 1996

FRANCES BERNARD AUER, et al.,

Petitioners,

- against -

DAVID A. ROBBINS, et al., etc.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE CITY OF NEW YORK ON BEHALF OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The City of New York and related entities ("City") have over 8,000 managerial employees, and thousands more supervisory employees, whom the City always has considered within the exemption for the Fair Labor Standards Act ("FLSA") for persons "employed in a bona fide executive, administrative or professional capacity." 29 USC section 213(a)(1). Over 5,000 of these employees have sued the City for back overtime and liquidated damages on the theory that under the salary basis test they actually are hourly employees. One of those cases went to a judgment that was adverse to the City on the principal legal issues and the Court of Appeals for the Second Circuit affirmed. Yourman v. Dinkins, 826 F Supp 736 (SDNY, 1993), aff'd, 84 F2d 655 (2d Cir, 1996). The City's petition for a writ of certiorari is pending. Giuliani v. Yourman, No. 96-152.

The judgment in Yourman, with interest and attorneys' fees, is now certainly over 14 million dollars for back overtime and liquidated damages and a very rough guess is that the City's exposure in the five other lawsuits may be as much as 20 to 25 million dollars.

The salary basis test, as applied in Yourman, leaves the City between the Scylla and Charbdis of making virtually all of its previously-exempt employees hourly employees and of revising its policies to mirror the salary basis test. Making all of its managers hourly employees would be costly; the City estimated, in the record in Yourman, that if it were to make all of its managers hourly employees and if each manager were to work two hours of overtime each week, the annual cost to the City would be 60 million dollars. This is a lot of money, even to the Nation's largest city, especially in these times of flat tax revenue and plummeting State and federal financial assistance, and especially when it would be paid for work already performed

and work performed by employees who always understood that they were to work as many hours each week as necessary to discharge their responsibilities and whose salaries were set with the understanding that they would not be paid overtime.

The alternative of revising policies to satisfy the salary basis test is no better. The City revised its policies after the District Court ruled on liability in Yourman in 1993. The policies now provide that under no circumstances may a manager be docked salary because of a court appearance or temporary military leave, even if all relevant leave balances have been exhausted. This obviously creates the potential for abuse by unscrupulous employees and at least arguably causes petitioners to violate the public accountability principle (see Petition for a Writ of Certiorari in Giuliani v. Yourman, No. 96-152 ["Yourman Pet."], at 10).

The revised policies also provide that disciplinary sanctions that would involve a loss of salary, such as a fine or suspension, may not be imposed. Termination and demotion, the only remaining meaningful penalties, are very serious penalties and the City is loath to impose them unless it believes that the infraction is equally serious and the Courts will not overturn them under the progressive discipline principle (see Yourman Pet. at 14). Because this leaves the City with no potential monetary penalties for less than very serious infractions, the City's ability to deter less than very serious infractions is greatly hampered.

In Yourman the City argues that the salary basis test, when applied to the public sector, is irrational and contrary to the intent of Congress and therefore should be struck down in its entirety as arbitrary and capricious under the Administrative Procedure Act. It is unclear to us at this time whether this argument will be made in the present case. If

it is, we respectfully refer the Court to the Yourman Petition (at 19-26) and Reply Brief in Support of Petition ("Yourman Pet. Reply") (at 1-4). If it is not, we respectfully submit that that would be a reason why the petition in Yourman should be granted.

THE SALARY BASIS TEST SHOULD RECEIVE ON JUDICIAL REVIEW ONLY SUCH DEFERENCE AS ITS PERSUASIVENESS PERMITS.

As a general rule, federal regulations are overturned by the Courts only if they are arbitrary and capricious. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984). However, agency "interpretations," as opposed to true "regulations," are entitled to deference only to the extent that they are persuasive. Skidmore v. Swift & Co., 323 US 134, 139-40 (1944) Here, the salary basis test of 29 CFR section 541.118(a) is found within Subpart B of 29 CFR Part 541, which is entitled "Interpretations." (Sections 541.1, 541.2 and 541.5d of 29 CFR are found in Subpart A of 29 CFR Part 541, which is entitled "General Regulations.") See 29 CFR Sections 500 through 899, revised as of July 1, 1996, at section 541.1. Congress did not instruct the Department of Labor ("DOL") to set the minimum wage, determine how many hours could be worked per week before overtime pay would be required, set the rate of overtime, or determine who would be exempt from the FLSA, but merely to "define[] and delimit[]" the managerial exemption. 29 USC section 213(a)(1).

Thus, the salary basis test is an "interpretation," not a "regulation" entitled to Chevron deference, and in reviewing it this Court should defer to the agency's expertise and interpretation of the managerial exemption only to the extent that the salary basis test is persuasive.

NEITHER PETITIONERS NOR EVEN THE DEPARTMENT OF LABOR ARGUES FOR A STRICT READING OF THE SALARY BASIS TEST.

The salary basis test provides that an employee is not within the managerial exemption if his or her salary is "subject to" reduction for any of several specified reasons. 29 CFR section 541.118(a). Strictly read, this provision means that the salary basis test is not met, and the employee is not within the managerial exemption, if there is any policy of the employer covering the employee under which a reduction in salary theoretically could occur for any one of the reasons set forth in the salary basis test.

Forgive us if we are stating the obvious, but neither petitioners nor even DOL argues that the salary basis test should be applied as it is written. Nor could they credibly do so.

First of all, the salary basis test undermines a strict reading of itself in two ways. It provides that employees need not be paid anything in workweeks in which they perform no work and it contains the "window of correction." 29 CFR section 541.118(a) & (a)(6). Both of these provisions undermine the notion that "[e]ither pay is fixed and immutable, ... or it is contingent," Abshire v. County of Kern, 908 F2d 483, 487 (9th Cir, 1990), cert. denied, 498 US 1068 (1991), upon which the salary basis test is based.

In addition, in response to this Court's invitation while the petition for a writ of certiorari was pending herein, the Solicitor General submitted a brief on behalf of DOL in which he stated that DOL's new view is that the salary basis test is not met only if the employee in question is subject to impermissible deductions as a practical matter. However, this was only the most recent and most hasty of the many

retreats DOL has made from the plain language of the salary basis test when applied to the public sector. Before the adoption of 29 CFR section 541.5d, DOL first ruled that where a partial-day deduction is made because of illness, the exemption would be lost only for that employee and only for the workweek in which the deduction was made (Yourman Pet. at 11). Then DOL announced a non-enforcement rule with respect to partial-day docking (id.). DOL finally effectively repealed the prohibition on partial-day docking (id. at 11-13).

In a December 1993 letter ruling, DOL stated, inter alia, that disciplinary suspensions of a workweek for reasons not constituting infractions of safety rules of major significance would be permissible and that absences from work for court appearances where the employee is under no legal compulsion to be present in court are absences for personal reasons and thus deductions may be made for such absences (Yourman Pet. at A 50-53). Finally, beginning in November of 1994 DOL began a semi-annual ritual of publishing, in its regulatory agenda in the Federal Register, both an acknowledgement that the salary basis test needs comprehensive revision and an adjournment of that comprehensive revision (Yourman Pet. at 30-32). Despite stating in November 1994 that the regulations are "sorely out-of-date," in May 1996 DOL gave the date of "01/00/97" for the date on which it would issue a notice of proposed rulemaking (Yourman Pet. at 32).

It is thus plain that for years not even DOL has believed in the salary basis test as written.

THIS COURT SHOULD HOLD THAT WHERE A DEDUCTION NOT PERMITTED BY THE SALARY BASIS TEST OCCURS, THE EXEMPTION IS LOST ONLY FOR THAT EMPLOYEE AND ONLY FOR THE WORKWEEK IN WHICH THE DEDUCTION IS MADE.

(1)

On January 15, 1986, DOL issued a letter ruling stating that where an occasional impermissible deduction occurs for a partial-day absence, the managerial exemption would be lost for that employee but only for the workweek in which the deduction took place (Yourman Pet. at A 40). DOL cautioned, however, that if such deductions were to become "regular and recurring," DOL "would question" whether the employee is in fact paid "on a salary basis" (id.).

We believe that if this Court does not invalidate the salary basis test as a whole, the foregoing formulation of how that test should be applied is the formulation that should be adopted by this Court. Although it originally was set forth only on the partial-day docking issue, which issue later was fully resolved by the promulgation of 29 CFR section 541.5d, that formulation works equally well (or equally unsatisfactorily) for the other types of deductions prohibited by the salary basis test.

There are, to be sure, shortcomings with this formulation. It focuses on the employee rather than the "capacity" in which the employee serves, which is the focus of the exemption in the statute. 29 USC section 213(a)(1) ("bona fide executive, administrative or professional capacity"). In close cases this formulation will beg the

question of whether the deductions are "regular and recurring."

Petitioners might argue that this formulation makes no sense in the disciplinary context because it rewards the miscreant, i.e., the person found guilty of disciplinary charges, in that only the miscreant who received an impermissible deduction is "rewarded" by being paid overtime. The answer, however, is that the salary basis test, and particularly the disciplinary component, make no sense in the public sector and thus if you start with it, wherever you come out is less than entirely satisfactory. (It is for this reason that we argue in Yourman that the entire salary basis test should be thrown out.) This argument would be made on behalf of people found guilty of disciplinary charges who would be seeking a windfall as the result of the fact that they committed infractions and their employers imposed a penalty other than termination or a suspension of some whole number of workweeks. How this is related to the goals of the FLSA is impossible to fathom (see Yourman Pet. Reply at 9-10).

Furthermore, if the alternative is that when an "impermissible" disciplinary sanction is imposed, the entire class of which the miscreant is a member is then considered hourly, the ridiculous result is that the entire class is rewarded with back overtime because of a single act of misfeasance (coupled with the impermissible penalty) (see Yourman Pet. at 35-36).

Petitioners and the Solicitor General, speaking on behalf of DOL, argue that this Court should pull out of the air the words "as a practical matter" and insert them after the words "subject to reduction." Courts do not do this; it is for agencies to write regulations.

Moreover, this standard is meaningless. It does not instruct a Court what to look at or what conclusion to reach.

The standard suggested above, that the Court look at whether the employee in question has been subjected to "regular and recurring" deductions, is far more instructive. The "as a practical matter" formulation adds next to nothing to the attempt to make sense of the phrase "subject to" in the salary basis test and its adoption by this Court would leave the lower Courts with little more guidance than they now have from DOL, which is to say, none (see Yourman Pet. at 31) (quoting 59 FR at 57130) (DOL complaining that judicial decisions "are creating law without considering a comprehensive analytical approach to current compensation concepts and workplace practices" [which is what we thought DOL is supposed to be doing]).

(2)

This Court also could take a broad interpretation of the word "inadvertent" in the "window of correction" provision of the salary basis test, which reads as follows, 29 CFR section 541.118(a)(6):

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

No deduction ever could be truly "inadvertent," as every deduction requires the intentional act of writing a paycheck for an amount different from the amount the employee usually receives. Thus, when DOL drafted the window of correction, it could not have intended a strict interpretation of the word "inadvertent."

Instead, giving meaning to the word "inadvertent" should focus on the employer's policy and whether the person who actually ordered the deduction was, and knew that he or she was, acting pursuant to and in compliance with the employer's policy toward those employees the employer considers exempt.

Such an interpretation of the word "inadvertent" would perhaps be the best result because it would protect both small and large State and local governments from simple errors that, in the view of the plaintiffs in these cases, allegedly should result in large payments of back overtime. Small governments may well have managers who do not know the salary basis test and who do not have access to lawyers who do. Large governments, such as the City with well over 8,000 exempt employees, face the possibility of erroneous deductions simply because of the large number of individuals who are involved in the process of implementing policies, issuing paychecks and imposing disciplinary sanctions.

(3)

Whatever result this Court reaches, the reasoning should encompass the "impermissible" deductions in the Yourman case so that those deductions do not render the plaintiffs in Yourman non-exempt. We say this in part because of course we want to win that case but also because it would be bad policy, and certainly could not have been the intent of Congress in enacting the FLSA, for all 8,000 City

managers to become non-exempt because discovery in Yourman revealed only the following arguably "impermissible deductions" in a span of over four years:

1. Plaintiff Harold Yourman was docked $6.25 for overstaying his lunch hour but the $6.25 was reimbursed in his next paycheck.

2. Plaintiff Vito LaBella was demoted for two weeks, which caused him to lose $258 in salary, for putting an obscene message, apparently about a female co-worker, on the Emergency Medical Services computer system. We note that DOL has said in the Federal Register that demotions are permissible penalties. 57 FR 37674.

3. Plaintiff Theodore DiGilio was suspended for nine days but then, pursuant to a settlement, was reimbursed for the nine days that he did not work and agreed to forfeit four vacation days.

4. Disciplinary sanctions imposed on managers who are not parties to the lawsuit are irrelevant because a Rule 23 class action is not available under the FLSA; employees must "opt in" or they will not benefit from the judgment. 29 USC section 216(a); LaChappelle v. Owens-Illinois, Inc., 513 F2d 286, 288 (5th Cir, 1975). In any event, even considering managers who were not parties to Yourman, cryptic documents in the record, about which there was no testimony, seem to indicate that three managers at the Fire Department, who are not plaintiffs in Yourman, each were fined five or ten days' pay on one occasion.

5. In addition, one employee of the Department of Housing Preservation and Development, Marvin Wilkinson, who also is not a plaintiff in Yourman, was fined twice for failing to file a financial disclosure form.

In short, all of the above arguably "impermissible deductions" should fall within the window of correction. Although only Mr. Yourman has been reimbursed to date, the window of correction was very narrowly interpreted by the Second Circuit Court of Appeals in Martin v. Malcolm Pirnie, Inc., 949 F2d 611 (2d Cir, 1991), cert. denied, 506 US 905 (1992), and under that ruling reimbursement by the City would not be sufficient to restore an employee to exempt status. We also must note that none of the other individuals have asked to be reimbursed; the plaintiffs in Yourman would prefer to leverage these "impermissible deductions" into windfall payments of back overtime rather than see these individuals reimbursed.

THIS COURT MUST BE AWARE THAT ITS HOLDING ON THE MEANING OF THE PHRASE "SUBJECT TO" MAY WELL BE APPLIED BY THE LOWER COURTS TO DEDUCTIONS FOR COURT APPEARANCES AND TEMPORARY MILITARY LEAVE AS WELL AS DEDUCTIONS AS DISCIPLINARY SANCTIONS.

Although the present case, to our knowledge, involves only deductions as disciplinary sanctions, the phrase "subject to" in the salary basis test applies to, and the "actual deduction/theoretical possibility" question arises as to, the other types of deductions rendered "impermissible" by that test as well (see Yourman Pet. at 16, 34-35; Yourman Pet. Reply at 2-3). Those are deductions for time missed for jury duty, appearance as a witness, and temporary military leave. 29 CFR section 541.118(a)(4). Thus, the lower courts probably will believe that whatever this Court says in this case about the phrase "subject to" and the "actual deduction/theoretical possibility" issue must be applied to issues concerning deductions for these other purposes.

We call this to the Court's attention, naturally enough, because issues concerning deductions for these other purposes arise in Yourman. The City's policy concerning court appearances was that paid leave would be granted only where the employee was under subpoena or court order and neither the employee nor a relative had a personal interest in the case, which is inconsistent with the salary basis test's requirement that employees be granted paid leave for "appearance as a witness" (although DOL held, in a letter ruling issued after the liability ruling by the District Court in Yourman, that an appearance as a witness where the employee is not under legal compulsion to be present could be considered a personal absence and thus paid leave would not be required [Yourman Pet. at A 52]). The City's policy concerning temporary military leave was that employees could receive up to 30 calendar or 22 working days of paid military leave each year, figures taken from federal and state statutes that should be sufficient to cover the absences usually incurred by members of the Reserves and National Guard. 5 USC sections 2105(a) & (d) and 6323(a)(1) & (b); 10 USC section 270; 32 USC section 502; NY Military Law section 242[5].

There was no proof in Yourman that any manager ever had one penny deducted from salary as a result of an appearance as a witness or "temporary military leave." Nevertheless, the District Court ruled that because the City's policy on appearances as a witness differed from the salary basis test, and because the "limitation on paid military leave presents the potential for employees on temporary military leave to take leave without pay," every plaintiff in Yourman was non-exempt. 826 F Supp at 742 (Yourman Pet. at A 18-19). The Court of Appeals affirmed on the opinion of the District Court. 84 F2d at 656 (Yourman Pet. at A 7).

Again, we respectfully submit that this is a ridiculous result, especially when the record contains no proof of a

deduction for a court appearance or "temporary" military leave, when the vast majority of the plaintiffs will never testify as a witness, and the vast majority of the plaintiffs are not even members of the Reserves or National Guard. Again, then, whatever this Court writes in the present case, the opinion should make clear that in the circumstances in Yourman the City's policies concerning appearances as a witness and "temporary" military leave do not render every plaintiff in Yourman non-exempt.

Respectfully submitted,

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October 11, 1996

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